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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 463

CHARLES JACKSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 26, 1929

CERTIORARI GRANTED DECEMBER 2, 1929

(34,594)

(34,594)

SUPREME COURT OF THE UNITED STATES

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Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the June Term, 1929, of said Court, before the Honorable Robt. E. Lewis, the Honorable John H. Cotteral and the Honorable Orie L. Phillips, Circuit Judges.

Be it remembered that heretofore, to-wit: on the thirtieth day of July, A. D. 1928, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the District of Kansas, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein United States of America was Appellant and Charles Jackson was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 The United States of America,

To Charles Jackson, Appellee, and T. W. Bell, his Attorney of Record—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to Petition for appeal allowed and filed in the Clerk's office of the District Court of the United States for the first Division of the Judicial District of Kansas, wherein The United States of America is Appellant, and you are Appellee, to show cause, if any there be, why the judgment rendered against the said defendant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable George T. McDermott, Judge of the District Court of the United States for the District of Kansas, this 3rd day of July, A. D. 1928.

GEO. T. McDERMOTT,
United States District Judge
for the District of Kansas.

Service acknowledged of the within citation for Charles Jackson, Plaintiff, and T. W. Bell, his attorney, this 17th day of July, A. D., 1928.

T. W. BELL
T. W. Bell, Attorney for Plaintiff
Without limitation to time of filing

Endorsed: Filed in U. S. District Court on July 18, 1928.

2 Petition to Recover War Risk Insurance.

In the District Court of the United States for the District of Kansas, First Division.

Charles Jackson, Plaintiff,
No. 2961. vs.
The United States of America, Defendant.

Now comes the plaintiff, Charles Jackson, in this his petition, and for his cause of action against the defendant, The United States of America, alleges:

First: that he is now a resident and citizen of the state of Kansas, it being in the first Judicial District of the State of Kansas; that he entered into the Military Service for the defendant, August 1st, 1918, and became a private in the United States Army and stationed at the Military camp of the United States of service as a soldier for the defendant.

Second: plaintiff further alleges that while in active duty in the Army of the defendant and sometime during the service of that enlistment, he applied for and was granted an insurance in the sum of ten thousand dollars, ($10,000), pursuant to the provisions of the War Risk Insurance Act; and the director of the bureau of the War Risk Insurance issued the following regulations relative to the definition of the term "Total Disability" and the determining as to when total disability should be permanent.

"Treasury Department"
Bureau of War Risk Insurance,
Washington, D. C.

March 9, 1918.

"By virtue of the authority conferred in section 13 of the War Risk Insurance Act, the following regulation is issued relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent;

"Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed in Articles III and IV, to be total disability.

3 "Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout life on the person suffering from it. Whenever it shall be established that any person to whom any install-

ment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantial gainful occupation, the payment of any installments of insurance shall be discontinued forthwith, and no further installments thereof shall be paid so long as such recovered ability shall continue."

That the above regulation was duly approved by the Secretary of the Treasury and that the same has at all times since the issuance thereof, been in full force and effect.

Third: Plaintiff further alleges that while in the Military Service of the defendant's, and while said insurance was in full force and effect, he was caused to take treatments and was given three (3) medical shots, and that such medical shots were given by a doctor of the United States Army; and that he was caused to take them at the request of his commanding officer; that such shots were inoculated in the arm, leg and hip; and that the left shoulder was inoculated three (3) times; that directly after the inoculation he became dizzy and had to lie down, that several times he had to leave his line of duty, that after taking the shots and medical treatments he became dizzy and his legs became affected and was affected with swelling and soreness and continued sore and was sore at the time he was discharged from the United States Army. He continued to grow worse and his left leg became wholly paralyzed from such treatment. He remained home many months trying to doctor himself, that in 1920 he was sent to the Old City Hospital at Kansas City, Missouri and remained there five (5) months, and afterwards was sent to the Soldiers' Home at Leavenworth, Kansas, and from there on August 17, 1923, he was sent to the Wheatley Hospital, Kansas City, Missouri; and on November 5, 1923, he entered the hospital at the Soldiers' Home where he has been ever since and where he has suffered with his legs, particularly his left leg which is completely paralyzed from the effect of the medical treatments he received when in the Army and in the line of duty. That the same has caused him to become sick and in a weakened condition; that he suffers great pain and distress and has never recovered his strength.

4 Fourth: plaintiff further states that he will never be well again, that he contracted all of such illness and weakness while in the United States Army, that he is not able to follow any occupation or work to make a living for himself, that this disability has been at all times since plain-

tiff's discharge from actual Military Service and that said disability resulting from said treatments and now exists under conditions which renders it reasonably certain that it will continue throughout the life of this plaintiff, and renders it impossible for him at any time to follow any occupation for a livelihood; that his whole entire body is affected, that he has dizzy spells and suffers great pain and annoyance, that he has many and various pains through his whole body, that he is in fact, an invalid and unable to care for himself, that this disease and condition was contracted while plaintiff was engaged in fulfilling his duty as a soldier in the defendant's Army and that this condition existed at the time of plaintiff's discharge and long before his discharge from the United States Army and are incurable and plaintiff will never be well again.

Fifth: plaintiff further states that by reason of the foregoing the monthly installments of the said insurance in the amount of Fifty-seven dollars and fifty cents ($57.50) each month, became due and payable to him, and that the same has been due and owing to him from the defendant each month from and after the first day of August, 1918, that said insurance was kept up and in full force until it was allowed to lapse all because of plaintiff's sick, weak and diseased condition as above described.

Plaintiff further states that he applied for compensation and was denied this compensation and is still denied compensation, that the Veterans' Bureau of the United States refused him compensation, that the United States Veterans' Bureau refused to compensate him in any manner; although the petitioner has many times asked and requested and made application for compensation, that several times during all this period the petitioner filed and refiled his claim for compensation with the United States Veterans' Bureau, but this Board refused to compensate him, and now refuses compensation to this petitioner or to give him any relief.

Sixth: petitioner further states that there is a disagreement between petitioner and the United States Veterans' Bureau under the contract for War Risk Insurance which contract was entered into by the petitioner and the defendant therein; that such War Risk Insurance is at this time due the plaintiff, that plaintiff has at numerous times demanded and requested that he be compensated and paid under such contract such War Risk Insurance.

Plaintiff further alleges that there is a disagreement at the present time between the United States Veterans' Bureau as to the amount of compensation which this plaintiff should receive for disability incurred in the line of duty in the Army of the United States.

Wherefore: plaintiff prays judgment upon this court upon the law and the facts against the United States of America for the payment to him of the installments on the plaintiff's War Risk Insurance in the amount of $57.50 each month from and after the discharge of the plaintiff on August 1, 1918, and henceforth, for the fixing and determining of the fee to be paid to the plaintiff's attorney for his service in connection with this action and for his costs herein expended, and further reliefs that he may be entitled to as a discharged soldier from the United States Army in and about this matter.

T. W. BELL
Attorney for plaintiff.

Verification.

State of Kansas,
County of Leavenworth—ss.

Charles Jackson, of lawful age, after being first duly sworn on oath, deposes and says that he is the plaintiff in the entitled cause of action, and that the facts set forth in his petition are true according to the best of his knowledge and belief.

CHARLES JACKSON

6 Subscribed and sworn to before me this 25th day of September, A. D., 1925.

E. K. SUYDAM
(Seal) Notary Public.

My commission expires, January 22, 1927.

Precipe for Summons.

The clerk of the United States District Court will please issue summons in the above entitled cause and action against the defendant, The United States of America, and serve upon Al. F. Williams, the District Attorney for the District of the State of Kansas for the defendant, a copy of the foregoing petition directed to the Marshal of your District and returnable according to law, endorsing thereon an action of

law brought for the purpose of recovering a money judgment upon War Risk Insurance.

T. W. BELL
Attorney for plaintiff.

Poverty Affidavit.

State of Kansas,
County of Leavenworth—ss.

I, Charles Jackson, being first duly sworn upon oath, depose and say that the cause of action set forth in this petition hereto prefixed, is just and I further swear that by reason of my poverty I am unable to give security for costs.

CHARLES JACKSON

Subscribed and sworn to before me this 25th day of September, A. D., 1925.

E. K. SUYDAM
(Seal) Notary Public.

My commission expires January 22, 1927.

Order for Granting Permission to File Case.

Now on this 29th day of October, A. D., 1925, the application of the plaintiff in the above entitled cause and action came on for hearing. The court being fully advised
7 as to the poverty of this plaintiff and his inability to furnish cost deposit for the filing ot his petition herein, the court finds that the plaintiff should be and he is hereby granted permission to file his petition herein with the clerk of the above entitled court.

Therefore: It is considered, ordered and adjudged that the plaintiff, Charles Jackson, be granted and is hereby ordered that the clerk of the above entitled court permit and allow the plaintiff herein to file his petition without a court deposit or other security for costs.

JOHN C. POLLOCK,
Judge of the District Court.

Affidavit for Mailing Copy of Petition.

I, T. W. Bell, of lawful age, after being first duly sworn on oath, depose and say that he mailed by registered mail on the 3rd day of November, A. D. 1925, a copy of the petition of

the above entitled action to the Attorney General of the United States of America and further affiant sayeth not.

T. W. BELL.

Subscribed and sworn to before me this 3rd day of November, A. D. 1925.

(Seal) E. K. SUYDAM,
Notary Public.

My commission expires January 22, 1927.

Filed in the District Court on November 4, 1925.

Summons.

District Court of the United States of America,
District of Kansas—ss.

8 The United States of America

To the Marshal of the District of Kansas—Greeting:

You are hereby commanded to notify The United States of America that it has been sued by Charles Jackson in the District Court of the United States for the District of Kansas, and that unless it answers by the 4th day of January, A. D. 1926, the petition of the said Charles Jackson against it filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 14th day of November, A. D. 1925.

Witness, the Honorable John C. Pollock, Judge of the District Court of the United States for the District of Kansas, and the Seal thereof, at Topeka, in said District, this 4th day of November, A. D. 1925.

(Seal) F. L. CAMPBELL, Clerk,
By Nelle Clough, Deputy Clerk.

Suit brought for the recovery of money. Amount claimed $57.50 each month from and after the discharge of the plaintiff on August 1, 1918, and henceforth, for the fixing and determining of the fee to be paid to the plaintiff's attorney for his service in connection with this action and for his costs herein expended.

T. W. BELL,
Attorney for Plaintiff.

U. S. Marshal's Return.

District of Kansas—ss.

Received the within writ at Topeka, Kansas, November 6, 1925, and executed the same as follows, to-wit: Served on the within-named United States of America by personally delivering to Alton H. Skinner, Assistant United States Attorney for the District of Kansas, no other or higher officer being found in this District, a true and certified copy of this writ with all endorsements thereon at Topeka, Kansas,
9 November 6, 1925. At the same time and in like manner I served a copy of the petition filed in this case.

F. R. FITZPATRICK,
U. S. Marshal,
Fee $2.00 By A. R. Trobert, Deputy.

Endorsed: Issued November 4th, 1925. Returnable November 14th, 1925.

Filed in the District Court on November 6, 1925.

Answer.

Comes now the above named defendant by Al. F. Williams, United States Attorney and Alton H. Skinner, Assistant United States Attorney and for answer to the petition of the plaintiff filed herein states:

(1)

The defendant does not know, and for that reason does not state nor admit that the plaintiff is a resident and citizen of the State of Kansas or a resident of the First Division of the District of Kansas as alleged in the first paragraph of his petition and requires strict proof of such residence and asks that strict proof of such residence shall be required by the court in this cause as to such allegation.

(2)

Defendant admits that a person giving his name as the name of plaintiff herein, entered the military service of the United States on August 1, 1918.

(3)

Defendant admits that the person giving such name applied for and was granted insurance in the sum of $10,000.00 as alleged in the second paragraph of plaintiff's petition filed herein.

(4)

Defendant admits that the regulation headed "Treasury Department, Bureau of War Risk Insurance, Washington, D. C. March 9, 1918", defining the term total disability as set out in the second paragraph of plaintiff's petition, was duly approved by Secretary of the Treasury and the same has at all times since the issuance thereof, been in full force and effect.

(5)

Defendant denies each and all of the allegations contained in the third paragraph of plaintiff's petition.

(6)

Defendant denies each and all of the allegations contained in the fourth paragraph of plaintiff's petition.

(7)

Defendant denies each and all of the allegations contained in the fifth paragraph of plaintiff's petition filed herein and further states that the matters alleged and set out in the second paragraph of the fifth [paragraph] of plaintiff's are matters which are not within the jurisdiction of this court to hear and determine.

(8)

Defendant admits that plaintiff has sought to collect on the policy of insurance hereinbefore referred to, and that upon due hearing and investigation on November 17, 1924, the Central Office Board of Appeals reviewed plaintiff's case and found no service connected disability and found further that plaintiff was not permanently and totally disabled for insurance purposes, the Board of Appeals at said time making a record of the following findings:

"N. P. Not due to service nor incident to service. Cerebro-Spinal Syphilis. Claimant not entitled to the benefits of the Act under Reg. #76, Sec. 7203 as the evidence is clear and unmistakable that the disability arose ten years prior to military service.

G. M. Not due to service nor incident to service. Gonorrheal Arthritis. Misconduct, Recurrence in Military service not caused by military service, but natural progress of the disease. Presumption of service connection rebutted by clear and convincing evidence."

and that a review was made of this cause by the Advisory Group on Appeals on said date, and made no change in the

finding of the Central Office Board of Appeals of November 17, 1924, and that this action was filed prior to the review hereinbefore mentioned.

11 As regards the last paragraph of paragraph sixth, in plaintiff's petition, defendant states that the matters therein alleged are not within the power and jurisdiction of this court to determine.

(9)

Defendant further states that since October 20, 1918, the said plaintiff, nor anyone in his behalf or for and on account of any person by the name of Charles Jackson had paid any premiums to keep said contract of insurance in force and effect.

(10)

Defendant states finally, that for the reason that there is nothing in the petition to identify the plaintiff as any particular Charles Jackson, who enlisted in the United States Military Service or who became a member thereof, that the defendant does not admit that the particular plaintiff filing this action was ever in the Military Service of the defendant and asks the court to require strict proof of the same and in advance of trial asks that defendant be furnished by the plaintiff, with copies of such documentary records as plaintiff may have and intend to offer in evidence as identifying as any particular Charles Jackson who became a member of the military establishment of the United States, such information to include his residence prior to the date of enlistment, his registration number and the District draft board which inducted him into the service, together with a copy of his discharge from the service, to the end that the defendant may prepare its defense to this action, defendant stating that its records show a great number of persons to be members of the military establishment of the United States in 1918 under the name of Charles Jackson.

Wherefore, having fully answered, defendant prays that plaintiff take nothing but his petition herein and that plaintiff recover its costs in this action.

AL. F. WILLIAMS,
United States Attorney.

ALTON H. SKINNER,
Assistant United States Attorney.

Filed in the District Court on March 1, 1926.

12 Motion to Strike.

Comes now the above named defendant by Al. F. Williams, United States Attorney and moves the court that the second paragraph of the fifth allegation in plaintiff's petition and the second paragraph in the sixth allegation be stricken from the said petition because it is incompetent, irrelevant and immaterial, and because the court is without jurisdiction to hear and determine the same.

AL. F. WILLIAMS,
United States Attorney.

L. E. WYMAN,
Assistant United States Attorney.

Filed in the District Court on January 24, 1928.

Order Granting Leave to File Amended Answer.

Now on this 25th day of January, A. D. 1928, it is hereby ordered that the defendant in this case be allowed to file an amended answer and motion to strike from plaintiff's petition.

JOHN C. POLLOCK, Judge.

Filed in the District Court on January 25, 1928.

Amended Answer.

Comes now the above named defendant by Al. F. Williams, United States Attorney, and L. E. Wyman, Assistant United States Attorney, and for Amended Answer to the petition of the plaintiff filed herein states:

(1)

Defendant pleads affirmatively that the petition shows on its face that the contract sued upon under the Insurance policy lapsed on November 19, 1918 and that this petition was not filed until November 4, 1925, and that the said action is barred and the plaintiff is precluded from suing by reason of the fact that the Statute of Limitations has run upon
13 this action if there ever was any valid claim upon the contract of Insurance due.

(2)

Further answering defendant states that he does not know, and for that reason does not state nor admit that the plaintiff is a resident and citizen of the State of Kansas or a resident

of the First Division of the District of Kansas as alleged in the first paragraph of his petition and required strict proof of such residence and asks that strict proof of such residence shall be required by the court in this cause as to such allegation.

(3)

Defendant admits that a person giving his name as the name of plaintiff herein, entered the military service of the United States on August 1, 1918.

(4)

Defendant admits that the person giving such name applied for and was granted insurance in the sum of $10,000 as alleged in the second paragraph of plaintiffs' petition filed herein.

(5)

Defendant admits that the regulation headed "Treasury Department, Bureau of War Risk Insurance, Washington, D. C. March 9, 1918" defining the term total disability as set out in the second paragraph of plaintiffs' petition, was duly approved by Secretary of the Treasury and the same has at all times since the issuance thereof been in full force and effect.

(6)

Defendant denies each and all of the allegations contained in the third paragraph of plaintiff's petition.

(7)

Defendant denies each and all of the allegations contained in the fourth paragraph of plaintiffs' petition.

(8)

Defendant denies each and all of the allegations contained in the fifth paragraph of plaintiff's petition filed herein and further states that the matters alleged and set out in the second paragraph of the fifth paragraph of plaintiff's
14 petition are matters which are not within the jurisdiction of this court to hear and determine.

(9)

Defendant admits that plaintiff has sought to collect on the policy of insurance hereinbefore referred to, and that upon due hearing and investigation on November 17, 1924, the Central Office Board of Appeals reviewed plaintiff's case and found no service connected disability and found further that

plaintiff was not permanently and totally disabled for insurance purposes, the Board of Appeals at said time making a record of the following findings:

"N. P. Not due to service nor incident to service. Cerebro-Spinal Syphilis. Claimant not entitled to the benefits of the Act under Reg. #76, Sec. 7203 as the evidence is clear and unmistakable that the disability arose ten years prior to military service.

G. M. Not due to service nor incident to service. Gonorrheal Arthritis. Misconduct. Recurrence in military service not caused by military service, but natural progress of the disease. Presumption of service connection rebutted by clear and convincing evidence."

and that a review was made of this cause by the Advisory Group on Appeals on said date, and made no change in the finding of the Central Office Board of Appeals of November 17, 1924, and that this action was filed prior to the review hereinbefore mentioned.

As regards the last paragraph of paragraph sixth, in plaintiff's petition, defendant states that the matters therein alleged are not within the power and jurisdiction of this court to determine.

(10)

Defendant further states that since October 20, 1918, the said plaintiff nor anyone in his behalf or for and on account of any person by the name of Charles Jackson had paid any premiums to keep said contract of insurance in force and effect.

(11)

Defendant states finally, that for the reason that there is nothing in the petition to identify the plaintiff as any particular Charles Jackson, who enlisted in the United States Military Service or who became a member thereof, that
15 the defendant does not admit that the particular plaintiff filing this action was ever in the Military Service of the defendant and asks the court to require strict proof of the same and in advance of trial asks that defendant be furnished by the plaintiff, with copies of such documentary records as plaintiff may have and intend to offer in evidence as identifying as any particular Charles Jackson who became a member of the military establishment of the United States, such information to include his residence prior to the date of enlistment, his registration number and the District draft

board which inducted him into the service, together with a copy of his discharge from the service to the end that the defendant may prepare its defense to this action, defendant stating that its records show a great number of persons to be members of the military establishment of the United States in 1918 under the name of Charles Jackson.

Wherefore, for the reasons set forth and having fully answered defendant prays that plaintiff take nothing by petition herein and that defendant recover its costs in this action.

AL. F. WILLIAMS,
United States Attorney,

L. E. WYMAN,
Assistant United States Attorney,
Attorneys for defendant.

Filed in the District Court on January 24, 1928.

Stipulation Waiving a Jury.

The parties to this action hereby waive the intervention of a jury, and agree that this action may be tried by the court.

T. W. BELL,
Attorney for plaintiff.

L. E. WYMAN,
Assistant United States Attorney.

Filed in the District Court on February 15, 1928.

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16 Journal Entry of Trial.

February 15, 1928.

Now on this 15th day of February, 1928, come the parties hereto; plaintiff appearing in person and by T. W. Bell, his attorney; defendant appearing by L. E. Wyman and B. L. Guffy, its attorneys and announce themselves ready for trial; thereupon a trial by jury having heretofore been waived in writing and filed herein, said cause comes on for trial to the court, and the plaintiff having introduced a portion of his testimony and announced that other of his witnesses were not present but reside in Kansas City in said district, the further hearing of said cause is postponed until tomorrow at ten o'clock A. M. at the United States Court room in Kansas City, Kansas.

Journal Entry of Trial.

February 16, 1928.

Now on this 16th day of February, 1928, come the parties hereto, plaintiff appearing by T. W. Bell; defendant appearing by L. E. Wyman, Assistant United States Attorney, and B. L. Guffey, attorney for the United States Veterans' Bureau and thereupon the trial of said case is proceeded with, and the court having heard the evidence and argument of counsel takes said case under advisement.

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17 Petition for Appeal.

Comes now the above named defendant, the United States of America, by Al F. Williams, United States Attorney, and L. E. Wyman, Assistant United States Attorney, and states to the court that said defendant, the United States of America feels itself aggrieved and damaged and that error has been committed by the decree, judgment and orders made and entered on the 17th day of May, A. D., 1928, and the 19th day of June, A. D., 1928 by the Court in the above entitled cause, and that said defendant desires to appeal and does appeal from said decrees and judgments and orders to the United States Circuit Court of Appeals for the Eighth Circuit and prays this court that this appeal may be allowed and that a Transcript of the Record, Proceedings and Papers necessary upon which said decree, judgment and order was made, duly authenticated may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

AL. F. WILLIAMS,
United States Attorney.

L. E. WYMAN,
Assistant United States Attorney.

Filed in the District Court on July 3, 1928.

Order Allowing Appeal.

Now on this 3 day of July, A. D., 1928 upon the petition duly filed herein,

It is hereby ordered that the appeal prayed for therein be and the same is hereby allowed.

GEO. T. McDERMOTT,
Judge.

Filed in the District Court on July 3, 1928.

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18 **Assignments of Error.**

Comes now the United States of America, Appellant in the above entitled cause, by Al. F. Williams, United States Attorney, and L. E. Wyman, Assistant United States Attorney, and in connection with its Petition for Appeal in this cause, assigns the following errors which the Appellant alleges occurred on the trial thereof and upon which it relies to reverse the judgment entered herein as appears of record;

1.

The court erred in allowing the appellee six per cent simple interest on each of the unpaid installments recovered in said judgment and allowing the appellee six per cent interest upon the judgment from the date of order of judgment, to-wit, May 17, 1928, until paid.

2.

The court erred in allowing Appellee any interest at all.

3.

The court erred in reserving jurisdiction of this cause in order that the Appellant might at any time present to this court and in this action any showing as to why such payment so directed in the order of judgment should cease;

To each of said findings and orders and rulings the Appellant duly excepted and exceptions were allowed;

Wherefore, Appellant herein prays that the judgment of the said court be reversed as to said findings and orders.

AL. F. WILLIAMS,
United States Attorney.

L. E. WYMAN,
Assistant United States Attorney.

Filed in the District Court on July 3, 1928.

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19 **Bill of Exceptions.**

Be It Remembered: That upon the trial of this cause during the December Term, A. D., 1927, of the District Court of the United States for the District of Kansas, first division, on the 15th day of February, A. D., 1928, before the Honorable George T. McDermott, Judge, the following proceedings were had:

Appearances:

T. W. Bell, Leavenworth, Kansas Attorney for Plaintiff.

L. E. Wyman, Assistant United States Attorney.

J. C. Pappenfort, Regional Attorney U. S. Veterans Bureau, Wichita Kansas.

B. L. Guffy, Special Counsel, U. S. Veterans Bureau, Washington, D. C., Attorneys for Defendant.

Memorandum Opinion.

This is an action at law upon a War Risk Insurance policy for ten thousand dollars, plaintiff claiming to have been permanently and totally disabled while the insurance was in force. The answer denies the disability and pleads the statute of limitations; it admits that on November 17, 1924, the bureau of war risk insurance rejected his claim and that a disagreement thereupon arose. A stipulation waiving a trial by jury was filed and the case tried to the court.

20 After the usual physical examination, the soldier was accepted for service and enlisted in the army on August 1st, 1918. He was discharged prior to the termination of hostilities and prior to the demobilization of his company, on October 30th, 1918, on a surgeon's certificate of disability, his discharge reciting that his physical condition when discharged, was "poor". He was granted ten thousand dollars of war risk insurance on August 7th, 1918, which lapsed for non-payment of premiums on December 1st, 1918. The plaintiff pleads and the defendant admits, that the following regulation of the Treasury Department defines permanent total disability as used in the statute authorizing the insurance:

"By virtue of the authority conferred in Section 13 of the War Risk Insurance Act, the following regulation is issued relative to the definition of the term 'total disability' and the determination as to when total disability shall be deemed permanent.

Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed in Articles III and IV, to be total disability.

'Total disability' shall be deemed to be 'permanent' whenever it is founded upon conditions which render it reasonably

certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation, the payments of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue."

The evidence is undisputed that he performed the ordinary duties of a recruit from the date of his enlistment until about the middle of September, when he fell out of the line while drilling and was thereafter permanently detailed on kitchen police, doing such light work as peeling potatoes and other tasks that can be done without the use of his legs. His condition became more acute; he was compelled to use a cane; his legs and hips refused to function properly, and on the 30th day of October, he was discharged for the reason above stated.

21 It is also undisputed that he has performed no work since his discharge. The plaintiff so testified, and the government's investigation reveals nothing to the contrary. It is not seriously disputed that he is now permanently and totally disabled. He is almost completely paralyzed from the waist down, being able to move only with great difficulty. He was in a hospital in 1920 for five months, and the doctors in charge of that hospital who examined him daily, and whose evidence is entirely credible, state that his condition was approximately the same then as it is now, and that he was then permanently and totally disabled within the meaning of the law. Another doctor for the government who examined him in 1924 testified that he has a disease of the spinal cord and in his opinion was totally and permanently disabled. Two other doctors for the government, who made most casual examinations, and who could not even recall whether he walked with a cane, but who said that he gave evidence of paralysis, testified that from their examination, they did not believe him to be totally disabled as far as their examination disclosed. Their opportunities for observation were slight, as compared with the other government doctors.

I am satisfied that this soldier became totally and permanently disabled while his insurance was in force. I do not agree with the plaintiff's contention that the disability was

caused by the injections of the typhoid and paratyphoid serums. The cause of his disability is undoubtedly syphilis, which existed long before his enlistment. The insurance granted covers any permanent total disability that occurs while the insurance is in force, and the cause of the disability is not of importance. If permanent total disability occurs while the insurance is in force, there is liability, and the government cannot defend because the insured was not in perfect health when the insurance was granted. As a matter of fact, a man who is permanently and totally disabled is not accepted for service in the army, and when the government doctors passed him for service, and the government granted the insurance, the government is foreclosed from defending upon ground of prior physical disability. Counsel for the government in the instant case was fair enough to so state. He said:

22 "Mr. Guffy: If your honor please, if this plaintiff became permanently and totally disabled while his insurance was in force, then it matured without regard to what the disability was."

This was decided in Jagodnigg vs. U. S., 295 Fed. 916.

There remains the question of the statute of limitations. The defendant contends, and the plaintiff agrees, that the plaintiff must have been permanently and totally disabled during the term of his policy, which lapsed on December 1st, 1918, in order to recover. The goverment contends that the applicable statute of limitations is five years, and since the suit was not commenced until November 4th, 1925, that the claim is barred by the statute.

The plaintiff on the other hand contends that the statute of limitations does not begin to run until he could have filed a suit on the claim; that by virtue of the Federal statute, a suit could not be maintained until a disagreement existed between him and the bureau of war risk insurance. It is admitted that disagreement arose on November 17th, 1924. The plaintiff contends that the statute does not bar the claim until five years have elapsed after the disagreement arose.

To this contention the defendant responds that the disagreement is part of the remedy, and not of the right; that a plaintiff may not toll the statute of limitations by failing to take a step necessary to perfect the remedy; that if he could, a plaintiff might delay action for fifty years.

Section 19 of the act, approved June 7th, 1924, as amended, makes the existence of a disagreement a condition precedent to an action on a war risk policy. It has been correctly held that in the absence of such a disagreement, an action may not be maintained.

Reece vs. United States, 17 Fed. (2d), 856, (D. C. Mo.);

United States vs. Lyke, 19 Fed. (2d), 876, (C. C. A. Ari.);

Actions on war risk policies are actions at law, and are governed by the usual procedure of the court in actions at law for money damages.

Law vs. United States, 266 U. S. 494.

23 The statutes of Kansas, and decisions construing that statute, govern in the case at bar. In Great Western Telegraph Co. vs. Purdy, 162 U. S., 329, the court said:

"The limitation of actions is governed by the lex fori, and is controlled by the legislation of the State in which the action is brought, as construed by the highest court of that State, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions."

A suit by a trustee in bankruptcy, in the federal court, to recover a stockholder's liability, is governed by the state statute of limitations, and the state decisions construing it.

Harrigan vs. Bergdoll, 270, U. S. 560.

To the same effect see:

Bauserman vs. Blunt, 147 U. S. 647;

Security Trust vs. Bank, 187 U. S. 211;

Black vs. Elkhorn Mining Co., 163 U. S. 445.

The Kansas statute provides that an action on a written contract must be brought within five years; and action upon a liability created by statute, other than a forfeiture or penalty, must be brought within three years.

Sec. 60-306 R. S. Kans. 1923.

In order to determine which statute is applicable, it is necessary to determine the nature of the liability under a war risk policy. It has been held that the liability of the United States on war risk insurance contracts is purely statutory.

Tomlinson vs. United States 18 Fed. (2d) 795. On the other hand it has been held that it is purely contractual, and the contract should be liberally construed in favor of the insured.

Starnes vs. U. S., 13 Fed. (2d) 212.

The authority of the United States to grant war risk insurance is conferred by statute. The provisions of that statute as to the class of persons to whom insurance may be granted, the limits in amount, the persons who may be designated as beneficiaries, are valid limitations upon the authority conferred and any contract which the government might undertake to make in excess of such limitations, would be invalid. One of the limitations is that the insurance should be subject to the provisions of the act, and of
24 any amendments thereto, and of any regulations thereunder, then in force or thereafter adopted.

The government did not enter this business for gain, but out of its own resources carried a considerable part of the cost of the insurance. The ordinary rules of liberal construction of the terms of an insurance contract, and of the liberal application of the doctrine of waiver, do not and should not apply to insurance granted by the government, as a part of its program of assistance to the soldiers and sailors of the great war.

Subject to such limitations, however, the relation is essentially that of contract. Entering into the contract is a voluntary act on the part of the soldier; the making and continuance of the contract requires the periodic payment by him of certain amounts, in return for which the government engages to do certain things. It is not dis-similar to the contracts made by fraternal insurance societies, which provide that the terms thereof may be changed by subsequent action of the society. When he enters into the contract, the soldier agrees, as a part of his contract, that the provisions thereof shall be subject to any amendments by congress and to regulations properly made under the act.

In White vs. United States, 270 U. S. 178, the Supreme Court said:

"The certificate of insurance provided in terms that it should be 'subject in all respects to the provisions of such Act (of 1917), of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and

the terms and conditions published under authority of the Act, shall constitute the contract.' These words must be taken to embrace changes in the law no less than changes in the regulations. The form was established by the Director with the approval of the Secretary of the Treasury and on the authority of Article I, Sec. 1, and Article IV, Sec. 402, of the Act, which, we have no doubt, authorized it. The language is very broad and does not need precise discussion when the nature of the plan is remembered. The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it and the relation of the Government to them if not paternal was at least avuncular. It was a relation of benevolence established by the Government at considerable cost to itself for the soldier's good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will. If the soldier was willing to put himself into the Government's hands to that extent no one else could complain. The only relations of contract were between the Government and him."

25 In Bean vs. United States, 7 Fed. (2d) 393, Judge Pollock said that the authorities were agreed that,

"war risk insurance is a special statutory kind of insurance, and contracts issued thereunder are not to be interpreted and construed according to the principles of law governing accident insurance, or other contracts of insurance."

In Birmingham vs. United States, 4 Fed. (2d) 508, the Court of Appeals, 8th Circuit, said:

"The government in devising and putting into effect its plan of war risk insurance did not enter the field of business in the accepted sense for commercial purposes and pecuniary gain, and therefore does not stand in the same relation to the insured as do ordinary insurance companies. It can be held only to the extent that it has expressly consented to be held upon contracts of this nature. No officer or employee of the government can waive or set aside the provisions of the statute, nor bind the government by any waiver, express or implied."

Regulations made under the law cannot change the provisions of the act passed, and thereby deprive one of a right given by the act.

Sawyer vs. United States, 10 Fed. (2d), 416. (C. C. A. N. Y.).

Subject to such limitations and qualifications and for the purpose of determining what statute of limitations is applicable, war risk insurance is contractual, and the statute of limitations governing a suit upon contracts should be applied, and not the limitation prescribed for a liability created by statute.

It does not appear that there was ever delivered to the plaintiff in this case the written certificate of the insurance which the government generally issued to soldiers who had applied therefor. In Bean vs. United States, 7 Fed. (2d) 393, it was held that the absence of manual delivery of such a certificate was not vital but that it would be considered that, in legal contemplation, the certificate had been issued to the plaintiff. Moreover it is the law of Kansas that the five year statute applies to an oral acceptance of a written offer.

Conry vs. McLean, 117 Kan. 595.

All war risk insurance was granted on written application, and whether the government did or did not get into the hands of the soldier, the written certificate is immaterial; it is still a "contract in writing".

Considering, then, that the case is governed by the five
26 year statute of limitations, the question still remains of whether the statute commences to run at the time the liability occurred or at the time the suit might have been brought.

The brief of the government sets out the general rule, with which there is no occasion to quarrel, that a plaintiff may not indefinitely toll the statute of limitations by failing to take some [precedural] step wholly within his power. It is apparent, at the outset, that the jurisdictional "disagreement" here involved, is not wholly within the plaintiff's power. With the multitude of claims filed with the Bureau, and the time necessarily involved in a proper investigation thereof, much time elapses after the soldier has done his part, before the Bureau can do its. Cases are not uncommon where the "disagreement" does not arise for many months, or even years, after the application is made. The time the application is pending in the Bureau, cannot, in justice, be charged to the soldier. Moreover, the time for filing the application is not necessarily the time when the physical disability occurred. A soldier cannot honestly apply for pay-

ment under his policy until he is satisfied in his own mind, that his disability is "permanent". Time cannot start, under any theory, to run against him until he is not only disabled, but has given up hope of being cured. "Hope springs eternal in the human breast". In the instant case, a paralysis of the legs, it is probably true that the plaintiff going from one hospital to another, did not easily despair of at least a partial recovery.

The rule must be either: 1. The statute of limitations starts when the soldier is disabled and knows it is permanent; runs until he applies for his insurance; stops until the "disagreement" and then starts again to run; or,

2. The statute doesn't start to run until the "disagreement" exists, the government having, in addition to the defense of limitation, the defense of laches in filing his claim, with the usual limitation that the time for filing the claim must not exceed the statute on the claim.

Since the question is decided by the law of Kansas, the cases cited by the government from other states are not persuasive, in the presence of Kansas cases in point. I have, however, examined such cited cases, and find nothing
27 in them opposed to the rule laid down by the Kansas decisions.

The Kansas decisions are clear.

In Kinnard vs. Stevens, 122 Kan. 348, the plaintiff sued to set aside a conveyance on the ground of fraud. More than the statutory period had elapsed, but because the plaintiff could not bring the action until he had first reduced his claim to judgment and execution had been returned nulla bona, the court held the statute did not start until the return of such execution. The Court said:

"The statute of limitations does not commence to run against a cause of action until the accrual thereof, and the accrual of the cause of action means, of course, the right to institute and maintain an action for its enforcement. (Young vs. Buck, 97 Kan. 39, 154 Pac. 213, on rehearing, 97 Kan. 195, 154 Pac. 1010; Hardware Co. vs. Semke, 105 Kan. 628, 185 Pac. 732; 37 C. J. 810)".

In Henly vs. Myers, 76 Kan. 723, 93 Pac. 168, 17 L. R. A. (N. S.) 779, the earlier Kansas cases are reviewed, and the law carefully and accurately stated. There, the preliminary step to suit went to the remedy, and not the right, and the

step was one altogether within plaintiff's power. The court safeguarded the rights of the defendant against the possibility of a fifty year delay, suggested by the government in this case. The Court said:

"It was within the power of the judgment creditor to cause these preliminary steps to be taken at any time, and he could not extend the statute of limitations indefinitely by neglecting to act. It was incumbent upon him to perfect his right of action within a reasonable time, which could never be more than the statutory period. West vs. Topeka Sav. Bank, 66 Kan. 527, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252".

The second syllabus of Railroad Co. vs. Burlingame Twp., 36 Kan. 628, is:

"Where preliminary action is essential to the bringing of an action upon a claim such as is required of the township trustee in chapter 105 of the Laws of 1870, and such precedent action rests with the claimant, he cannot prevent the operation of the statute of limitations by long and unnecessary delay in taking such action; but the statute will begin to run in a reasonable time after he could by his own act have perfected his right of action; and such reasonable time will not in any event extend beyond the statutory period fixed for the bringing of such an action."

To the same effect see,

Henley vs. Myers, 76 Kan. 723

Kulp vs. Kulp, 51 Kan; 341.

Donaldson vs. Jacobitz, 67 Kan. 244.

Young vs. Buck, 97 Kan. 195.

28 The suit having been commenced within five years of the accrual of the cause of action, the "disagreement", the statute is not a bar. If the plaintiff failed to apply for his insurance within a reasonable time (not to exceed five years) after he knew his disability was permanent, the government might interpose a defense of laches. Such defense is not pleaded.

Passing the question of pleading, the defense is not made out by the record. The record does not show when the petitioner applied for his insurance. The record does show that the government knew he carried insurance, and that the government knew as much, or more, about his disability than the plaintiff, from the day of his discharge in 1918, on.

Most of his time has been spent in government hospitals. Laches is equitable, and turns largely on the circumstances of each case. The petitioner knew little of his rights, the government, all there was to know. In any event, both the statute and laches are affirmative defenses, and the government failed to carry the burden of proof.

Haxen vs. Ferriter, 124 Kan. 261.

Emerson vs. Peters, 110 Kan. 87,

Beachy vs. Jones, 108 Kan. 236,

Bullock vs. Kendall, 80 Kan. 791.

This seems to be the most practicable rule. The date of disagreement is a fixed date; the date the disability is known to be permanent, is not. It is more flexible and more just. Many a disabled soldier goes from hospital to hospital, hoping and expecting relief; he confuses compensation and insurance; he believe the government, in caring for him and paying him compensation, is doing so under his insurance policy. Cases undoubtedly exist where maligners fail to put in their claims until the evidence is scattered or gone; in such the government is protected by the rule above quoted.

The plaintiff's policy matured on the date of his discharge, October 30, 1918. Payments at the rate of $57.50 per month have been due since date; similar payments will be due in the future. Is interest recoverable on the back payments; and may a judgment be rendered for future payments?

It has been held to the contrary by the Court of Appeals of the Ninth Circuit, as to both questions.

United States vs. Lyke, 19 Fed. (2d) 876.

29 There are three cases cited by that Court, in support of the decision as to interest:

United States vs. North American Co., 253 U. S. 330. The Government appropriated private property, without condemnation and action was brought in the Court of Claims for the value of the property. Although the Court said it was a hardship on the plaintiff, interest was not allowed because a statute expressly forbade it. The Court said:

"Interest may not be added because Section 177 of the Judicial Code, re-enacting Section 1091 of the Revised Statutes, declares that: 'No interest shall be allowed on any claim up to the time of the rendition of judgment thereon

by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest' ".

United States vs. Rogers, 255 U. S. 163. The Government condemned property, and the owner claimed, and was allowed, interest from the date of the taking, to the date of payment therefor.

Standard Oil Co. vs. United States, 267 U. S. 76. Action on a marine policy issued under the same statute as here involved. The plaintiff recovered for loss of a vessel which foundered, because a Lieutenant of the British Navy boarded the vessel, and, although he did not in fact alter her course, he reserved the right to do so. Interest was allowed, the Court saying:

"When the United States goes into the business of insurance (Act of Sept. 2, 1914, c. 293, Section 5,) issues policies in familiar form and provides that, in case of disagreement, it may be sued, it must be assumed to have accepted the ordinary incidents of suits in such business, including the payment of interest."

The Court, in the Lyke case, distinguished the latter case, because the government was not in the business of insuring soldiers for gain. That is true, but, I do not understand that the United States entered the marine insurance business for gain. I understand that it entered that business in 1914, so our commerce could be kept on the seas. Private insurers did not care to carry the risk of vessels in a submarine-infested sea, nor the risk of a soldier on the fields of Flanders. It may be the government paid a bit more of the carrying cost of soldiers' insurance, than it did of marine insurance; but that changes neither the terms of the contract nor the motive for making it.

An opinion by the Circuit Court of Appeals of another circuit is persuasive, and entitled to great weight. But in the absence of controlling authority, I can not bring myself to the conclusion that any sound reason exists why the government should pay the Standard Oil Company interest on a lost vessel, and not pay a soldier interest on lost legs, when both are insured under the same statute.

The same decision holds that no judgment can be rendered for future payments. The government has agreed to pay this policy by installments; it has consented to be sued, which means it has consented that a judgment be rendered against it. Congress gave express power for the Court to allow attorneys fees, as follows:

"That wherever a judgment or decree shall be rendered in an action brought pursuant to said section 445 of this chapter the court, as a part of its judgment or decree, shall determine and allow reasonable fees for the attorneys of the successful party or parties and apportion same if proper, said fees not to exceed 10 per centum of the amount recovered and to be paid by the Bureau out of the payments to be made under the judgment or decree at a rate not exceeding one-tenth of each of such payments until paid."

It would be possible, of course, to award no judgment for the future, retaining jurisdiction so that if the government should decline to pay, despite a final judgment, the soldier could make appropriate application for relief. Which way it is done is not very material. The provision with reference to allowing fees makes the first plan the simpler.

A judgment will be entered for the plaintiff, for the payments due with 6% interest, and that the bureau shall make future payments as provided by the contract; it will provide that it may be opened up at any time for the purpose of showing that the disability no longer exists, reserving jurisdiction for that purpose. An attorney's fee, not to exceed 10%, will be taxed, payable as provided by law, and the parties may furnish their suggestions as to the amount, in writing, or by other proof; costs to follow the judgment.

It is so ordered:

GEO. T. McDERMOTT
Judge.

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31 (Judgment, February 16, 1928.)

Now on this 16th day of February, A. D., 1928, at Kansas City, Kansas, this cause comes on for trial before the Court without a jury, all parties having heretofore filed their written waiver of a trial by jury. The plaintiff appeared by T. W. Bell, and the defendant appeared by L. E. Wyman, Assistant U. S. Attorney, J. C. Pappenfort, Regional Attorney, United States Veterans' Bureau, Wichita, Kansas, and B. L. Guffy, Special Counsel, United States Veterans' Bureau, Washington, D. C. Thereupon the plaintiff introduced his evidence and rested. Thereupon the defendant demurred to the evidence of the plaintiff for the reason that his evidence failed to prove or tend to prove a cause of action and for the further reason that the evidence showed that the cause of action if any, was barred by the statute of limitations, which demurrer was overruled. Thereupon the defendant introduced evidence on its behalf and rested.

Thereupon the defendant moved that the court declare as a matter of law that there could be no recovery upon the undisputed evidence and moved for a judgment upon the evidence, which motion was by the court overruled.

Thereupon the matter was submitted to the court for decision.

Thereafter and on the 14th day of March, 1928, the Court being duly advised in the premises, files his memorandum opinion, and the facts set out therein are hereby adopted as the findings of fact in this case.

It is therefore considered, ordered and adjudged:

1. That the plaintiff was totally and permanently disabled during the term of the policy of insurance sued on.

2. That the plaintiff have and recover of and from the defendant the sum of $57.50 for each and every month from the 30th day of October, 1918, to the date of this judgment, together with six per cent simple interest on each of said unpaid installments, and that this judgment bear six per cent interest from this date until the same is paid.

3. That out of such sum there is hereby allowed to T. W. Bell, the attorney for the plaintiff, the sum of
32 $800.00 as an attorney fee, in full for his services to the plaintiff herein.

4. That the defendant pay the costs of this action.

5. That from and after this date the bureau of war risk insurance shall pay directly to the plaintiff the sum of $57.50 per month as long as he shall live, and his permanent disability shall continue, unless the plaintiff should forfeit his right to the same as provided by the war risk insurance act. Jurisdiction of this cause is reserved in order that the defendant may at any time present to this court and in this action any showing as to why such payments so directed to be made should cease.

6. To each of such findings and orders and rulings the defendant duly excepted, which exceptions are hereby allowed.

GEO. T. McDERMOTT
Judge.

Approved by:
L. E. Wyman,
Assistant United States Attorney.

Application to Modify Judgment.

Comes now the defendant, the United States of America, by Al. F. Williams, United States Attorney and L. E. Wyman, Assistant United States Attorney, and moves the court for an order modifying the decree of judgment heretofore entered in this case as to interest and costs being taxed against the defendant, and the retention of jurisdiction by the court, for the reason that the defendant stands ready to pay the judgment as rendered except as to the allowance of the interest and costs, and that the payment of the amount of judgment at once to the plaintiff will be of great benefit to him; and for the further reason that the defendant would desire to appeal from said judgment as to the allowance of interest and costs, and retention of jurisdiction, which delay the payment of this judgment.

Wherefore, defendant prays the court for an order modifying said decree of judgment heretofore entered al-
33 lowing interest on deferred installments and costs against the defendant, and the retention of jurisdiction of the court allowing defendant opportunity to present to the court at any time any showing as to why payments should cease.

AL. F. WILLIAMS,
United States Attorney.

L. E. WYMAN,
Assistant United States Attorney.
Attorneys for Defendant.

Order Modifying Judgment.

Upon this 19th day of June, 1928, comes on to be heard the application of the defendant heretofore filed to modify the judgment heretofore rendered. The defendant appears by Al. F. Williams, L. E. Wyman, and J. T. Williamson, its counsel and plaintiff appears by T. W. Bell, his counsel. Thereupon, being duly advised in the premises the Court finds:

1. That the decision of the Court heretofore made that liability exists under said policy of insurance, is not contested by the defendant; the contentions of the defendant being that such liability should not draw interest as provided in the judgment, that costs should not be taxed to the government, and that the court should not retain jurisdiction for the purposes set out in the judgment.

2. The Court further finds that the plaintiff is in destitute circumstances and in a precarious condition of health, and that he should not, in justice, be deprived of the amount of money that is concededly due him, pending an appeal. The Court further finds that the defendant should have the right to appeal from such parts of said judgment as it believes are erroneous, and that all its rights in such respect ought to be preserved.

It is therefore considered, ordered and adjudged:

1. That the judgment heretofore entered is modified by eliminating the provision therein that costs should be taxed against the defendant and in lieu thereof the costs in this action are hereby taxed against the plaintiff.

34 2. The application of the defendant to eliminate from said judgment the item of interest provided for therein is hereby denied.

3. The application of the defendant to eliminate from said judgment the provision with reference to the retention of jurisdiction is denied, without prejudice to renew said motion at any time; the purpose of said provision in the decree being to enable the government to make a proper showing at any time if the condition of the plaintiff should change, and was inserted in said decree for the benefit of the defendant; if the investigation of the defendant at any time is such that it becomes satisfied that there will never be any change in the plaintiff's condition, or by reason of the death of the plaintiff, or for any other reason, upon proper showing, this court will eliminate such provision.

Exception to each and all of said rulings is made by the defendant and the exceptions are hereby allowed.

4. The defendant shall be and is hereby permitted to pay to the plaintiff the sum conceded to be due him, without prejudice to its right to appeal as to the other parts of said judgment and without prejudice to appeal from the action taken on this application.

5. Upon additional showing as to the services performed, made this date, and upon application of the plaintiff, the provision as to the attorney's fees in the judgment heretofore entered is set aside and in lieu thereof the attorney's fees of

ten per cent is allowed to T. W. Bell, attorney for the plaintiff to be paid as provided by law.

Done, at Topeka, Kansas, this 19th day of June, 1928.

GEO. T. McDERMOTT,
District Judge.

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35 (Approval of Bill of Exceptions by District Judge.)

Defendant prays that the foregoing matters and things, rulings and exceptions may be made a part of the record herein, and tenders this its Bill of Exceptions within the time allowed to file the same, and prays the court to allow, sign and seal the same and make the same a part hereof; which is by the court accordingly done; and

Witness whereof, the Honorable George T. McDermott, Judge hereto sets his hand, name and official signature, this 3rd day of July, A. D., 1928.

GEORGE T. McDERMOTT,
Judge.

Filed in the District Court on July 18, 1928.

Praecipe.

To The Clerk:

Please make transcript of proceedings in the above entitled cause to include:

1. Petition.
2. Praecipe.
3. Poverty Affidavit.
4. Summons.
5. Answer.
6. Motion to Strike.
7. Order Granting Leave to File Amended Answer.
8. Amended Answer.
9. Stipulation Waiving Jury.
10. Journal Entry of trial, February 15 and 16, 1928..
11. Petition for Appeal.

12. Order Allowing Appeal.

13. Assignments of Error.

14. Citation, and

15. Bill of Exceptions.

36

AL. F. WILLIAMS,
United States Attorney.

L. E. WYMAN,
Assistant U. S. Attorney,
Attorneys for plaintiff.

Service of within praecipe for transcript acknowledged this 12th day of July, A. D., 1928.

T. W. BELL,
Attorney for plaintiff
(Without limitation to time of filing.)

Filed in the District Court on July 18, 1928.

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37 (Clerk's Certificate to Transcript.)

United States of America,
District of Kansas—ss.

I, F. L. Campbell, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the within and foregoing to be a true, full and correct transcript of so much of the record and proceedings in case No. 2961, entitled, The United States of America, Appellant, vs. Charles Jackson, Appellee, in said Court, as is called for by the precipe on file herein.

I further certify that the original citation is attached hereto and returned herewith.

Seal
U. S. Dist. Court
Dist. of Kans.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Topeka, in said District, of Kansas, this 28th day of July, 1928.

F. L. CAMPBELL,
Clerk.

Filed July 30, 1928. E. E. Koch, Clerk.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals for the Eighth Circuit, viz.:

Appearances.

Filed in United States Circuit Court of Appeals for the Eighth Circuit.

For Appellant.

The Clerk will enter my [our] appearance as counsel for the appellant.

AL F. WILLIAMS,
U. S. Attorney.

L. E. WYMAN,
Assistant U. S. Attorney.
Topeka, Kans.

Endorsed: Filed Aug. 2, 1928. E. E. Koch, Clerk.

For Appellee.

The Clerk will enter my appearance as counsel for the appellee.

T. W. BELL,
Leavenworth, Kans.

Endorsed: Filed Aug. 17, 1928. E. E. Koch, Clerk.

United States Circuit Court of Appeals
Eighth Circuit.

December Term, 1928. Thursday, January 3, 1929.

United States of America, Appellant, vs. Charles Jackson. No. 8273. Appeal from the District Court of the United States for the District of Kansas.

Pursuant to stipulation of parties this cause is continued from the present December Term, 1928, to the May Term, 1929, of this Court.

A true copy.

Attest:
(Seal)

E. E. KOCH,
Clerk, United States Circuit Court of Appeals for the Eighth Circuit.

United States Circuit Court of Appeals
Eighth Circuit.

January Term, 1929. Saturday, March 30, 1929.

Order

Under the provisions of the Act of Congress approved February 28, 1929, (entitled "An Act To amend sections 116, 118 and 126 of the Judicial Code, as amended, to divide the eighth judicial circuit of the United States, and to create a tenth judicial circuit")

It is Ordered by this Court that all appeals, writs of error or other proceedings from the States comprising said Tenth Circuit in which no hearing before this Court has been held and which have not been submitted for decision, together with the original papers, printed records, briefs, and record entries therein duly certified (including a list of the General Docket entries showing amounts of deposits with the Clerk and of Clerk's fees earned), and, also, the unexpended balances remaining from the deposits in all such matters, be and the same are hereby ordered to be and are transferred from this Court to the Circuit Court of Appeals for the Tenth Circuit.

The cases so transferred by this order are contained in a list attached to this order and made part thereof.

And it is further ordered by this Court that as soon as the files in the foregoing cases are ready for transfer and upon first being advised of the organization of that Court, and the appointment of a Clerk, that same be by the Clerk of this Court shipped by express to the Clerk of the Circuit Court of Appeals for the Tenth Circuit at Denver, Colorado, the Clerk of this Court to take receipt for same and for the unexpended balances of the deposits so transferred.

And it is further ordered by this Court that when such transfer or shipment is made, the Clerk of this Court or his deputy shall go to Denver to personally check all files, etc., to the Clerk of said Tenth Circuit and to then and there take receipt therefor, which receipt or receipts shall be filed by the Clerk and shall thereby become and be preserved as a part of the record of this Court.

In those cases in which the transcript of the record is now being printed in this Court and the printing has not been completed when the transfer hereby ordered is to be made, the Clerk of this Court will, first having obtained authority from the Court of Appeals for the Tenth Circuit, have said printing

completed under his supervision, charging his supervising fee therefor, and will then transmit under this order the files and printed copies of the record, etc., therein.

March 30, 1929.

List of Cases Transferred to Tenth Circuit.

* * * *

Number 8273. United States v. Charles Jackson (District of Kansas).

* * * *

United States Circuit Court of Appeals
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing 6 pages contain a full, true and complete copy of the order of transfer of cases, list of cases and list of orders enlarging time to file records attached thereto, from the United States Circuit Court of Appeals for the Eighth Circuit to the United States Circuit Court of Appeals for the Tenth Circuit, as full, true and complete as the originals thereof remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 16th day of April, A. D. 1929.

(Seal) E. E. KOCH,
Clerk, U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed: Filed April 18, 1929. Albert Trego, Clerk.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals for the Tenth Circuit, viz.:

(Order)

Third Day, April Term, Monday, April 22d, A. D. 1929.

Before Honorable Robert E. Lewis, Senior Circuit Judge, and Honorable J. Foster Symes, District Judge.

In the Matter of Cases transferred from The Eighth Circuit.

At this day, it appearing to the Court that the Clerk of this

Court has received from the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit the original transcripts of record, printed transcripts, briefs, records and files in certain cases transferred to this Court under the provisions of the Act of Congress, Approved February 28, 1929, creating the Tenth Circuit;

It is hereby ordered that said cases be entered upon the dockets of this Court for disposition in due course, said cases being numbered and entitled as follows, to-wit:

• • • •

No. 20 (No. 8273) United States v. Charles Jackson (District of Kansas).

• • • •

Appearances.

Filed in the United States Court of Appeals for the Tenth Circuit.

For Appellant.

The Clerk will enter my appearance as counsel for the appellant.

JAMES T. BRADY,
Washington, D. C.
U. S. Veterans Bureau.

Endorsed: Filed April 22, 1929. Albert Trego, Clerk.

The Clerk will enter my appearance as counsel for the appellant.

LAWRENCE A. LAWLOR,
Washington, D. C.
U. S. Veterans Bureau.

Endorsed: Filed June 3, 1929. Albert Trego, Clerk.

For Appellee.

The Clerk will enter my appearance as counsel for the appellee.

THOMAS AMORY LEE,
643 New England Bldg.,
Topeka, Kans.

(Order)

First Day, June Term, Monday, June 3rd, A. D. 1929.

Before Honorable John H. Cotteral and Honorable Orie L. Phillips, Circuit Judges.

United States of America, Appellant, vs. Charles Jackson, Appellee. 20. Appeal from the District Court of the United States for the District of Kansas.

This cause came on to be heard and was argued by counsel, Erskine Wyman, Esquire, and Lawrence A. Lawlor, Esquire, appearing for appellant, and Turner W. Bell, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

United States Circuit Court of Appeals
Tenth Circuit.

No. 20.—June Term, A. D. 1929.

United States of America, Appellant, vs. Charles Jackson, Appellee. Appeal from the District Court of the United States for the District of Kansas, First Division.

July 29, 1929.

L. E. Wyman, Assistant United States Attorney, of Topeka, Kansas (Al F. Williams, United States Attorney, was with him on the brief), for appellant.

Turner W. Bell, Esquire, of Leavenworth, Kansas, for appellee.

Before Lewis, Cotteral and Phillips, Circuit Judges.

Phillips, Circuit Judge, delivered the opinion of the court.

Charles Jackson brought this action against the United States to recover upon a policy of war risk insurance under and by virtue of Sec. 445, Title 38, U. S. C.

The trial court ordered and adjudged that appellee recover the sum of $57.50 for each and every month from October 30, 1918, to the date of said judgment, to-wit: February 16, 1928, together with interest at the rate of six per cent per annum on each of such unpaid instalments and that the judgment bear

interest at the rate of six per cent per annum from its date until paid.

The trial court further ordered and adjudged "that from and after this date the bureau of war risk insurance shall pay directly to the plaintiff the sum of $57.50 per month as long as he shall live, and his permanent disability shall continue, unless the plaintiff shall forfeit his right to the same as provided by the war risk insurance act. Jurisdiction of this cause is reserved in order that the defendant may at any time present to this court and in this action any showing as to why such payments so directed to be made should cease."

The United States has appealed from this judgment and has assigned two grounds of error. First, that the Court erred in awarding interest to the appellee on the unpaid instalments and on the judgment. Second, in reserving jurisdiction of the cause to determine, upon application of the United States, whether payment of future instalments should cease.

First, with reference to the question of reserved jurisdiction. It is well settled that the Court was without authority to render judgment for payments of future instalments on the contract of insurance. United States v. Lyke, C. C. A. 9, 19 Fed. (2d) 876, 878; United States v. Napoleon, C. C. A. 5, 296 Fed. 811, 815.

The United States cannot be sued except by its own consent, and the right of the insured to sue the United States upon a contract of war risk insurance is given solely by the provisions of Sec. 445, Title 38, U. S. C., which reads in part, as follows:

> "In the event of disagreement as to claim under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28, and section 765 of Title 28, in so far as applicable."

The right to sue upon such a claim, under this statute, arises only in the event of disagreement between the bureau and the insured in respect to such claim. In the instant case the right of the appellee to future instalments, under his contract of insurance, depends upon the continuation of total permanent disability. If he should recover the ability to follow a substan-

tially gainful occupation, his right to receive such future instalments would cease, under the provisions of Treasury Regulation No. 11. The determination of such a recovery, in the first instance, rests with the bureau of war risk insurance. The jurisdiction of a District Court of the United States to determine whether the appellee had so recovered would not arise until a disagreement had occurred relative thereto between the insured and the bureau.

It is therefore our conclusion that the trial court erred in undertaking to reserve jurisdiction to determine whether the payment of future instalments should cease. United States v. Luke, supra, pages 877-878.

Second, with reference to the award of interest. This presents a more difficult question. The general rule as to the right to recover interest on claims against the United States was stated in Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299, as follows.

> "The rule is that, in the absence of a stipulation to pay interest or a statute allowing it, none can be recovered against the United States upon unpaid accounts or claims."

See also Boston Sand & Gravel Co. v. United States, 278 U. S. 41 at 47.

An ordinary claim must be distinguished from a claim for damages for the taking of property for public use because in the latter case the constitution provides for just compensation and just compensation includes interest from the date of the taking to the date of the payment. Seaboard Air Line Ry. Co. v. United States, supra, pages 304-306.

Neither the statute nor the contract of war risk insurance makes express provision for the payment of interest. If the United States is liable for interest it must be because of an implied provision of the contract.

In the case of Standard Oil Co. of N. J. v. United States, 267 U. S. 76, which was an action upon a policy of marine insurance issued under the provisions of the Act of September 2, 1914, U. S. Comp. St. 1918, Sec. 514, the court held that when the United States went into the business of insurance, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business, including the payment of interest. This case was relied upon by the trial court as authority for awarding interest in the instant case.

It is true that Congress, by the same statute, created the bureau of war risk insurance and authorized the government to issue policies of marine insurance and policies of life and permanent disability insurance. However, the Acts of Congress disclose that the nature and purposes of the two classes of insurance differed in material particulars. Marine insurance was first authorized by the Act of September 2, 1914, 38 St. 711, Sec. 2 thereof reads as follows:

> "That the said Bureau of War Risk Insurance, subject to the general direction of the Secretary of the Treasury, shall, as soon as practicable, make provisions for the insurance by the United States of American vessels, their freight and passage moneys, and cargoes shipped or to be shipped therein, against loss or damage by the risks of war, whenever it shall appear to the Secretary that American vessels, shippers, or importers in American vessels are unable in any trade to secure adequate war risk insurance on reasonable terms."

The provisions for life and disability insurance were provided by the amendment of October 6, 1917, 40 St. 409.

Sec. 400 of Art. IV, of the Act of October 6, 1917, reads as follows:

> "That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided."

In the Standard Oil case the Supreme Court held that the United States had gone into the business of marine insurance and issued marine insurance policies in the usual form of such policies. On the contrary, in issuing life and disability insurance policies, under the provisions of the amendment of October 6, 1917, the United States did not go into the life insurance business and did not issue life insurance policies in the usual form. Furthermore, under such policies the payments to be made in case of death or permanent disability were not indemnity in their entirety, but were partly in the nature of pension.

In the case of Birmingham v. United States, 4 Fed. (2d) 508, the court said:

> "The government in devising and putting in effect its plan of war risk insurance did not enter the field of business in the accepted sense for commercial purposes and pecuniary gain, and therefore does not stand in the same relation to the insured as do ordinary insurance companies. It can be held only to the extent that it has expressly consented to be held upon contracts of this nature."

In the case of White v. United States, 270 U. S. 175, at page 180, the Court said:

> "The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it and the relation of the Government to them, if not paternal, was at least avuncular. It was a relation of benevolence established by the Government at considerable cost to itself for the soldier's good."

In the case of United States v. Lyke, supra, at page 877, the court said:

> "The war risk insurance contract for the soldier is not a business contract. It partakes of the nature of both insurance and pension."

Since the government, by issuing its policies of life and permanent disability insurance under the provisions of the amendment of October 6, 1917, did not go into the life and disability insurance business and since the contracts of insurance issued thereunder were not the same as ordinary insurance contracts issued by private life insurance companies but provided for payments partially in the nature of insurance and partially in the nature of pension, we do not think it follows that by issuing such contracts and consenting to be sued thereon the United States accepted the ordinary incidents of suits upon ordinary contracts of life insurance, including liability for interest. It follows that the contract contained no implied promise to pay interest. It is therefore our conclusion that the Court erred in awarding interest.

The cause is reversed and remanded with instructions to grant a new trial to the United States.

(Judgment.)

Thirteenth Day, June Term, Friday, August 2nd, A. D. 1929.
Before Honorable Robert E. Lewis, Senior Circuit Judge, and Honorable J. Foster Symes, District Judge.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and order of the said District Court be and the same is hereby reversed, and that this cause be and the same is hereby remanded to said District Court with instructions to grant a new trial to the United States.

Motion for an Extension of Time Within Which to File a Petition for a Rehearing.

The Appellee respectfully presents this, his application for an extension of time within which to file a petition for a rehearing, and in support thereof presents the following:

I.

The Question Involved in the Petition for a Rehearing.

This was an action on a war risk insurance policy. The trial court rendered judgment for the Appellee (the plaintiff) and allowed 6% simple interest on each of the unpaid instalments of $57.50 per month recovered in said judgment, and 6% simple interest upon the judgment from the date of the order of judgment until paid. The Appellant assigned as error (inter alia) on this appeal the allowance of interest. This court held that the trial court erred in allowing interest and reversed the cause. The question involved in the petition for a rehearing is whether or not this court should have allowed interest upon the judgment in accordance with the judgment of the trial court.

This application is based upon the following:

II.

Grounds for an Extension of Time.

1. The date of the judgment of this court was July 29, 1929. Counsel for the Appellee were not able to secure a copy of the opinion until more than thirty days had elapsed from the date of the judgment, and thirty days has not now elapsed since a copy of the opinion was secured.

2. One of the undersigned counsel has just been retained in this cause and has not heretofore had an opportunity to inform himself concerning the question involved.

3. Counsel are advised by the office of the United States Attorney for the District of Kansas, that no case is now pending in the Supreme Court of the United States bearing upon the question involved herein, and that this cause is a precedent upon the determination of which other war risk insurance cases in this circuit depend.

Wherefore, the Appellee respectfully prays that the time within which a petition for a rehearing in the above entitled cause may be filed, be extended to and including the 30th day of September, 1929, or,

In the event that this application be denied, that a stay be granted for ninety days from this day within which to file a petition for a writ of certiorari in the Supreme Court of the United States.

TURNER W. BELL,
THOMAS AMORY LEE,
Counsel for Appellee.

Certificate of Counsel.

I, Thomas Amory Lee, counsel for the above named Appellee, do hereby certify that the foregoing motion for an extension of time within which to file a petition for a rehearing of this case is presented in good faith and not for delay.

THOMAS AMORY LEE,
Counsel for Appellee.

Acknowledgment of Service.

I hereby acknowledge service of a copy of the foregoing motion for an extension of time within which to file a petition for a rehearing, this 10 day of September, 1929.

L. E. WYMAN,
Assistant United States Attorney.
Attorney for Appellant.

Filed Sept. 10, 1929. Albert Trego, Clerk.

(Order)

Twenty-fifth Day, June Term, Wednesday, September 11th, A. D. 1929.

Before Honorable John H. Cotteral and Honorable Orie L. Phillips, Circuit Judges.

This cause comes on to be heard on the motion of counsel

for appellee for an extension of time within which to file a petition for a rehearing herein, no one appearing for either party hereto.

Thereupon, on consideration thereof, it is now here ordered by the court that the said motion be and the same is hereby denied.

It is further ordered by the court that no mandate of this court issue herein until the 1st day of November, 1929.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Tenth Circuit.

I, Albert Trego, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Kansas as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, h. and filed in the United States Circuit Court of Appeals for the Eighth Circuit and in the United States Circuit Court of Appeals for the Tenth Circuit (except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States), in a certain cause in said Circuit Court of Appeals wherein United States of America was Appellant and Charles Jackson was Appellee, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at office in the City of Denver, Colorado, this twenty-second day of October, A. D. 1929.

ALBERT TREGO,
Clerk of the United States Circuit Court
of Appeals, Tenth Circuit.

(Seal, U. S. Circuit Court
of Appeals, Tenth Circuit)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 2, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.